

STATE OF MICHIGAN  
COURT OF APPEALS

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CURTIS SMITH,

Plaintiff-Appellant,

v

YAZDI N. AMARIA, M.D. and DR. YAZDI N.  
AMARIA, M.D., P.C.,

Defendants-Appellees.

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UNPUBLISHED

March 26, 2009

No. 283229

St. Joseph Circuit Court

LC No. 07-000656-NH

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(7) based on the expiration of the statute of limitations. We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The alleged malpractice in this case involved a surgery that was performed on December 29, 2004. Absent tolling, the statute of limitations would have expired on December 29, 2006. See MCL 600.5805(5). However, MCL 600.2912b requires that a notice of intent to file a claim be mailed at least 182 days before the lawsuit is commenced. If a compliant notice is filed, MCL 600.5856(c) provides that the notice tolls the period of limitations for “the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.” MCL 600.2912b(2) provides:

The notice of intent to file a claim . . . *shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim.* Proof of the mailing constitutes prima facie evidence of compliance with this section. . . . [Emphasis added].

Defendant’s business address was 111 South Monroe Street in Sturgis, Michigan. On May 2, 2006, plaintiff’s counsel sent a request for medical records to defendant at 11 South Monroe Street. Counsel received the records in June 2006. On December 4, 2006, Debora A. Quinn sent the required notice of intent to defendant at 11 South Monroe Street. She signed a notarized proof of service reciting that she mailed the notice with a return receipt requested. The receipt was not returned; defendant apparently did not receive the notice. On February 8, 2007,

plaintiff's counsel sent a letter to defendant at the 11 South Monroe Street address, explaining that he had not received any response to the notice. Defendant's insurance company responded. Thereafter, plaintiff filed his complaint on June 26 2007, and served it on July 7, 2007. Service was made by certified mail to 11 South Monroe Street, and defendant signed the return receipt.

The trial court concluded, reluctantly, that the statute of limitations was not tolled by the December 4, 2006, mailing of the notice of intent since it was not mailed to defendant's business address, and she had in fact not received it. We review the grant of summary disposition de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

In *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64; 642 NW2d 663 (2002) (*Mecosta I*), our Supreme Court held that, "the tolling of the statute of limitations [pursuant to § 5856(d)] is available to a plaintiff only if all the requirements included in § 2912b are met." In *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 691; 684 NW2d 711 (2004) (*Mecosta II*), our Supreme Court similarly held:

[I]t is plaintiff's burden to establish compliance with § 2912b and, in turn, to establish entitlement to application of the notice tolling provision, § 5856(d). . . .

In *Fournier v Mercy Community Health Care Sys-Port Huron*, 254 Mich App 461, 463-464; 657 NW2d 550 (2002), an apparent clerical error resulted in defective notices of intent in that they were sent to only one intended recipient who was subsequently not named in the lawsuit. This Court held that "use of the word "shall" in subsection 2912b(2) makes mandatory the requirement that the notice be mailed in accordance with its provisions." *Id.* at 468. Further, since the language of the statute is clear, the *Fournier* Court expressly rejected a good faith argument, an argument based on the fact that defendants may have actually received the notice more timely, and an argument based on lack of prejudice. *Id.* at 469.

The applicable language in the present case is not, in this context, as clear. Although the address used was not accurate, plaintiff had successfully used the address on a previous occasion. Thus, for plaintiff, it was "the last known professional business address" for defendant. The notice was sent to 11 South Monroe not because of a clerical error, but because plaintiff reasonably believed this was the last known professional address based on the previous successful mailing. The statute does not specify that the last known address be the official last known address of the defendant, as opposed to an address based on the subjective understanding of the plaintiff. Since plaintiff sent the notice to the last known address he had for defendant, we conclude that plaintiff met the requirements of the statute.

Defendant notes that there was no signed receipt to prove that there was a mailing. Although a return receipt was requested, the statute does not require such proof. The statute requires only "proof of the mailing". Here, a notarized proof of service by mailing was filed. The lack of a signed receipt indicates that defendant may not have received the mailing, but does negate the prima facie showing that it was sent. The Legislature did not require receipt to establish an effective mailing.

Reversed and remanded for proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Cavanagh

/s/ Karen M. Fort Hood

/s/ Alton T. Davis